83-611

No. _____

Office-Supreme Court, U.S.
FILED
OCT 11 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

MICHAEL SCHAEFER,

Petitioner,

vs.

JOAN STONE; JOAN STONE, as trustee under Declaration of Trust known as the H.I. STEVENS TRUST dated April 28, 1967,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

MICHAEL SCHAEFER
Post Office Box 12164
La Jolla, California 92037
(619) 450-0720

Attorney-Petitioner
Appearing Pro Se

October 10, 1983

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTIONS PRESENTED

1. Whether *breach of implied covenant of good faith* is an issue of Tort, or of Contract? (Inconsistencies in adjudication being a denial of equal protection of the law, Fourteenth Amendment.)

2. Whether award of attorney fees, costs and sanctions of more than $13,000 in a civil action seeking not more than $300.00 is violative of rights to freedom of speech and petition of government (First Amendment) and due process of law (Fourteenth Amendment), "chilling" the raising of such questions by borrowers throughout the country?

3. Whether award of attorney fees to lender in a tort action insulates lenders everywhere from accountability for their tortious conduct, in violation of equal protection of the laws and due process of law protections (Fourteenth Amendment)?

4. Whether due process of law (Fourteenth Amendment) is wanting in granting judgment to a fiduciary (Trustee) when such person is sued only as an individual, or when judgment is based wholly on a promissory note that was never "assumed" by borrower but was part of property purchase "taken subject to" said note containing a standard attorney fee provision?

5. Whether totality of proceedings and cumulative effect of various rulings granting more than $13,000 in fees, costs and sanctions by adjudicating a $300.00 tort action to be a contract action has resulted in denial of due process of law protections of the Fourteenth Amendment?

(All References to Amendments refer to the United States Constitution.)

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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

MICHAEL SCHAEFER,

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vs.

JOAN STONE; JOAN STONE, as trustee under Declaration of Trust known as the H.I. STEVENS TRUST dated April 28, 1967,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Petitioner Michael Schaefer, also known as John Michael Schaefer, a Member of the Bar of the United States Supreme Court appearing Pro Se, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Department, Superior Court of the State of California for the County of San Diego entered December 9, 1982, hearings on review refused by the Court of Appeal, Fourth Appellate District, on May 12, 1983 and on July 1, 1983 and by the Supreme Court of California on July 14, 1983.

OPINION BELOW

The judgment of the Appellate Department, Superior Court of California for the County of San Diego, is a judgment of the highest court of the State of California in which decision could be had upon the issues herein, the Court of Appeal and Supreme Court exercising their discretion to decline to review the judgment of the lower court. Thus the petition is directed toward such lower court in accordance with practices of the United States Supreme Court.

JURISDICTION

The order of the Supreme Court of California denying hearing of the case was entered on July 14, 1983; this petition for certiorari being filed within 90 days of that date. This Court's jurisdiction is involved under 28 U.S.C. § 1257(3).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law. . . . abridging the freedom of spech or the right to petition the Government for a redress of grievances;

Fourteenth Amendment

No state shall enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Michael Schaefer purchased an apartment house in 1972 from Mrs. Faye M. Scott, taking title subject to existing loans, including a $110,000 note in favor of a Trust. Monthly payments were faithfully and punctually made for nearly 8 years, with exception of a balloon payment of $80,000 due September 20, 1980; Schaefer was in process of finalizing refinancing of said $80,000 with Home Federal Savings when his efforts were aborted by the filing on October 7, 1980, 17 days after maturity of note, of a Notice of Default by respondent Joan Stone (with whom he had been dealing over the years) causing the prospective lender to reject the refinancing.

Schaefer filed a complaint plainly labeled as a tort action seeking compensatory and punitive relief, because of his inability to deal with institutional lenders due to the Notice of Default hastily filed by Stone; Schaefer waived recovery in excess of $300.00 by paying the $17.00 filing fee specified for $300.00 maximum jurisdiction; he obtained refinancing from private parties at higher costs and paid off the balloon payment. (Municipal Court in 1980 charged $17.00 filing fee for actions seeking not over $300.00, $28.00 filing fee for total $15,000 jurisdiction of the court.) Please see copies of complaint and cross-complaint, Appendix B.

Schaefer's complaint established all required elements of a tort; a duty flowing from Stone to Schaefer, a breach thereof, and proximate cause, alleging bad faith on part of Stone. Stone's attorney in an affidavit in support of Subpoena Duces Tecum re: Deposition of Home Federal Savings loan officer stated:

> "4. The subject matter of the pending action is alleged breach of implied covenant of good faith: TORT."

and further acknowledged therein that Schaefer alleged damages due to actions of Stone concerning his attempts to borrow money from Home Federal Savings.

Stone asserted the Schaefer suit to be an "action on this note," of a contract nature. Ultimately Stone as Trustee recovered judgment in the trial court for $10,000 in attorneys fees and appellate fees, costs and sanctions that run to more than $13,000, with her trust counsel expected to seek additional fees for petitions to the Court of Appeal, the California Supreme Court and to the United States Supreme Court. The trial

court found in its April 27, 1981 granting of summary judgment "that the issue of Schaefer's liability for the attorney fees of Stone is without substantial controversy and at the trial of cross-complaint this issue shall be deemed established."

The entire basis of the Stone cross-complaint for attorney fees being the following language from the note executed by Schaefer's predecessor in title, Faye M. Scott, with the Trust:

> "If action be instituted on this note, the undersigned promises to pay such sums as the court may adjudge as attorneys fees."

The various orders entered in the case appear in Appendix herein.

Because of perceived substantial and recurring problems affecting borrowers and lenders throughout the country seeking to determine the nature of the implied covenant of good faith articulated by the courts in insurance litigation and existing in all commercial relationships, and because of federal constitutional deprivations set forth in Questions Presented, this petition comes forward.

Federal questions sought to be reviewed were raised in petitions to Appellate Department, Superior Court, and to Court of Appeal, Fourth District, and ignored or denied by reviewing bodies in their opinion or in their summary denial of hearing.

> (1) Petition for Rehearing filed in Superior Court case #484539, for review of the trial court's determinations herein, at page 5, contains assertions by petitioner that award of attorney fees more than 30 times damages prayed for violated equal protection of the law (Fourteenth Amendment) and that the trial court's $10,000 assessment had a "chilling effect" on freedom of speech and petition of government contrary to First Amendment protections.
>
> (2) Application for Certification filed with Appellate Department, at page 5, asserts denial of evidentiary hearing as to any aspect other than attorney-fee-quantum violated due process of law (Fourteenth Amendment) and that size of the fee award had a "chilling effect"

offensive to First Amendment, and that award of fees more than 30 times exposure to damages was a denial of equal protection of the law, Fourteenth Amendment, in view of size of awards in relation to damage exposure in other civil disputes summarily adjudicated.

(3) Petition for writ of review filed in Court of Appeal, at page 3, asserted denial of due process of law (Fourteenth Amendment) by sustaining of demurrer without having a finding as to attorney fee liability, the issue being unresolved until after running of time for review of underlying legal issue as to tort liability--and being apparently inapplicable to the case because of controlling decisions on the issue from Appellate Department having jurisdiction over the Municipal trial court.

All references to constitutional amendments *supra*, are to United States Constitution. Cumulative effect of various rulings was a denial of the "fundamental fairness" of the entire proceedings that due process of law, Fourteenth Amendment, mandates, appearing only at conclusion of hearings; quickness of reviewing courts to ignore the tort versus contract issue, to summarily deny hearing, and to met out additional fees and sanctions for frivolous appeal evidences a rejection of articulation of viable issues by petitioner appearing in proper person, and a reward to senior trust counsel. There are no other methods to bring these issues to reviewing courts other than by brief and petition as has been done.

Dates and Nature of Prior Orders

*Dec. 3, 1981	Municipal Court entered judgment for Joan Stone, as Trustee, for $10,259.50.
*Dec. 9, 1982	Superior Court (Appellate Department) affirms award plus $2,500.00 additional fees and $500.00 sanctions.
Feb. 3, 1983	Superior Court (Appellate Department) denies petition for rehearing and application for certification to the Court of Appeal filed *Pro Se*.

April 12, 1983 Superior Court (Appellate Department) denies petition for Hearing Re: Recall of Remittitur filed *Pro Se* (assertion that award was in excess of jurisdiction).

*May 12, 1983 Court of Appeal denies petition for Writ of Review filed *Pro Se*.

*July 1, 1983 Court of Appeal denies second petition for Writ of Review filed by counsel.

*July 14, 1983 California Supreme Court denies hearing.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant And Recurring Problems With Respect To A Litigant's Ability To Address Alleged Tortious Conduct On The Part Of Lenders Throughout The Country

The action of a trial court in calling a tort action a contract action, in order to trigger attorney-fees provisions, is of immediate importance far beyond particular facts and parties involved; a great many people base their plans on the principle that they can challenge bad faith conduct, by way of action on implied covenants of good faith, without surprise subsequent liability for unlimited attorney fees.

The failure or refusal of the state courts to articulate their denial or ignoring of federal claims raised is just as reviewable as an express decision, and the cumulative effect of the proceedings making apparent a denial of "fundamental fairness" gives rise to a constitutional claim that can be presented only at conclusion of hearings herein. *Chambers v. Mississippi* (1973) 410 U.S. 284, 290, n. 3; 35 L.Ed.2d 297, 306.

If it is conscionable to assess petitioner with all the legal research a major law firm might undertake in connection with an unchartered area of the law, more than $13,000, then the decision might reflect due process; however in determining the reasonable value of professional services a significant factor is the amount of money or value of interests involved--and here the $80,000 loan balance was never at stake; only the

*Included in Appendix A.

added costs of seeking alternative refinancing--which petitioner put at $300.00 by waiving excess claim. Such excess offends Due Process.

The magnitude of the issues here is apparent when we realize that every contract contains implied covenants. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Brown v. Superior Court* (1949) 34 Cal.2d 559, 564; 212 P.2d 878; "Breach of this duty is a tort." *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 574; 108 Cal.Rptr. 480; *Richardson v. Employers Liab. Assur. Corp.* (1972) 25 Cal.App.3d 232, 239; 102 Cal.Rptr. 547.

The nature of the implied-covenant is further explained: "The duty which arises from the covenant of good faith and fair dealing is *unconditional* and *independent* in nature; it is not controlled by events in the same manner as conditions precedent or subsequent." *Cleary v. American Airlines, Inc.* (1980) 111 Cal.App.3d 443, 453 (emphasis in original).

The lower court's opinion ignores the tortious character of the original complaint and discusses only whether petitioner is bound by provisions of the note because he "took subject to" rather than "assumed" the existing loan at time of purchase of his apartment investment.

Lenders throughout the country will feel immune to challenge for their tortious conduct if trial courts are permitted to misconstrue pleadings so as to award lender's counsel at the expense of aggrieved borrowers, more to dissuade the borrower from coming to court than to do justice to the facts. In *Smithers v. Metro-Goldwyn-Meyer Studios, Inc.* (1983) 139 Cal.App.3d 643, 649; 189 Cal.Rptr. 20, 23; we find that "the tort of breaching an implied covenant of good faith and fair dealing consists in bad faith action, *extraneous to the contract*, with the motive intentionally to frustrate the obligee's enjoyment of contract rights." Calling an "apple" and "orange" will leave in limbo borrower's ability to protect themselves from capricious or overreaching conduct by lenders everywhere, will limit the less-powerful in their analysis and challenge to actions of the more-powerful; this being a significant and recurring problem affecting the hopes and aspirations of the general population.

2. The Decision Below Conflicts With Decisions Of Other Appellate Courts As To Whether Breach Of Implied Covenant Of Good Faith Is A Tort Or Not; Review Necessary Here To Secure Uniformity Of Judgments

We have two decisions of the Appellate Department of the Superior Court, having jurisdiction over Municipal Courts, both to the effect that attorney fees are not awarded in tort actions arising out of a contractual relationship, such as a lease with attorney fee provisions; copies of said judgments appear in Appendix herein. A Municipal Court litigant should be able to rely on said pronouncements of the Appellate Department to which he would address any issues on review. Please see copies of said appellate opinions, Appendix B.

In *Heidt v. Miller Heating Co.* (1969) 271 Cal.App.2d 135, 137; 74 Cal.Rptr. 695; the appellate court said that plaintiff "could have brought a tort action and award of fees would have been improper, but pleading and trial were on theory of breach of contract, fees properly claimed." Petitioner in instant case sought trial only on the bad faith issues set forth in a complained clearly framed in Tort. *Stoud v. Turney* (1978) 22 Cal.3d 718; 586 P.2d 1288, tells us that a tort action arising out of contract is not "an action on a contract" within meaning of statutory authorization for attorney fees in an action on a contract.

We are not just dealing with disputed findings of fact. We are dealing with actions without jurisdiction. The court below having clearly ignored rulings by its Appellate Department became a "loose cannon." In *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456; 20 Cal.Rptr. 321; the California Supreme Court held that it was an act in excess of jurisdiction for an Appellate Department of a Superior Court to fail to follow binding prior decisions under the doctrine of *stare decisis*. If the Supreme Court of California had granted hearing, it would have been compelled to rectify the situation here. The Appellate Department of the Superior Court exceeded its jurisdiction by affirming the Municipal Court's award of attorney fees in this tort case; the Supreme Court of California committed error by refusing to grant hearing on the well-documented 23-page brief filed by appellate counsel therein.

"The Legislature, following the general American rule, has established that each party to a lawsuit is responsible for his or her own attorney's fees in the absence of an agreement between the parties for fees or a statute specifically authorizing fees." *Pederson v. Kennedy* (1982) 128

Cal.App.3d 976, 979; 180 Cal.Rptr. 740; the general rule is that successful plaintiff in a tort action is entitled to *costs*, but not to attorney's fees unless express statutory provision is made therefore. (4 Witkin, *Summary of California Law*, § 882, p. 3168.) The record contains no evidence by which respondent Stone could take her cross-complaint for attorneys fees out of control of the general rule. It should have been subject to demurrer as not stating a cause of action.

The note itself was drafted by the lenders, as all notes routinely are, and is of course construed against the lender. But in an extrajurisdictional act, the trial court has found the following provision to warrant attorney fees payable to the lender in petitioner's complaint questioning lender's representative's good faith:

> "If action be instituted on this note, the undersigned promises to pay such sums as the Court may adjudge as attorney's fees."

If we do not act to secure uniformity in this rapidly emerging area of the law, breach of implied covenants of good faith, we are leaving litigants to walk a vast minefield and casting precedents into a hole from Alice in Wonderland.

3. The Decision Below Sanctions Such A Departure From Accepted And Usual Course Of Judicial Proceedings By A Lower Court As To Invoke This Court's Power Of Supervision, To Prevent A Grave Miscarriage Of Justice

The decision here to award horrendous attorney fees over a petty claim (that could have been brought in any small claims court just as well), under some strained construction that the litigation involved an action to collect on the Note results in a decision so totally devoid of evidentiary support as to render the entire chain of proceedings unconstitutional under the Due Process protection of the 14th Amendment, U.S. Constitution; it is a result that is unjust, unreasonable, and plainly wrong. *Thompson v. City of Louisville* (1960) 362 U.S. 199.

As an officer of the court, petitioner-attorney has an obligation to mold and sculpt the law, rather than simply to recite it, looking to the needs and aspirations of contemporary America and the future. To

permit a case to involve combined attorney fees of almost $30,000, half from each side of the case, including petitioner's own professional time, over a case that could not result in more than $300.00 damages to respondent without leave of court and payment of additional filing fees--and to permit such award even though existing controlling Appellate Department decisions hold that fees are inapplicable to an action sounding in tort--shocks one's conscience and does not reflect well on public opinion as to the legal profession. This is a make-work and punitive-result case the likes of which will come to the highest Court in our land only once in a generation, if then.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Appellate Department of the Superior Court of California for the County of San Diego.

October 10, 1983

Respectfully submitted,

MICHAEL SCHAEFER
Post Office Box 12164
La Jolla, California 92037

Attorney-Petitioner
Appearing Pro Se

APPENDICES

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

San Diego Judicial District

NO. 294 278
Cross-complainant
STONE
VS.
Cross-defendant
SCHAEFER

NOTICE OF ENTRY
OF
JUDGMENT

FOR FILE STAMP

Rec'd.

Cathy O'Connor

ROBERT G. STEINER
Luce, Forward, Hamilton and Scripps
110 West "A" Street
1700 Bank of California Plaza
San Diego, CA 92101

ATTORNEY FOR PLAINTIFF

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE:

That on DEC - 3, 1981 in the Municipal Court of the San Diego Judicial District, County of San Diego, State of California, judgment was entered in favor of

JOAN STONE, as trustee under Declaration of Trust known as the H.I. STEVENS TRUST dated April 28, 1967
above named Cross-complainant, and against
MICHAEL SCHAEFER
above named Cross-defendant(s) for $10,000.00 attorney fees plus costs $259.50.

CLERK OF COURT

By _____, Deputy

C. O'CONNOR

FILED
DEC 09 1982
TONI HINTON

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED DEC. 09, 1982

JOAN STONE, as trustee, etc., Cross-complainant and Respondent, vs. MICHAEL SCHAEFER, Cross-defendant and Appellant.	SUPERIOR COURT NO. 484539 MUNICIPAL COURT NO. 294278 (San Diego Judicial District) **OPINION**

Appellant Michael Schaefer filed a "Complaint for Money Damages" against Ms. Stone alleging in a verified complaint they had been partners for seven (7) years in a real estate financing contract, a part of which was a promissory note.

Ms. Stone demurred to the complaint and filed a cross-complaint. Her demurrer was sustained without leave to amend. Each of the parties filed a motion for summary jdugment as to the attorney fee issue on the cross-complaint. Schaefer's was denied and Stone's was granted as to Schaefer's liability to pay attorney's fees. This left the amount of fees to be awarded Ms. Stone as the only remaining issue for trial.

At trial the court awarded $10,000.00 in fees. Schaefer appeals contending that he cannot be bound to the fee provision of the note without having assumed the obligations of said note in writing. We disagree. Schaefer did not complain that he was not a party to the promissory note in the summary judgment proceedings or at trial. It is noteworthy that the only cross-complaint summary judgment issue was the attorney fee provision of the note.

On the contrary, Schaefer's verified complaint states he had been a party to the contrct for seven (7) years. In his sworn declaration in connection with the summary judgment motion Schaefer states he has fully paid "in connection with that certain trust deed loan between himself and Joan Stone as trustee . . ."

The fee award is affirmed and respondent's request for fees and sanctions on appeal is granted. The principal issues raised on appeal were not raised at trial.

Fees are granted in the amount of $2,500.00 and sanctions of $500.00.

BY THE COURT

SHERIDAN REED J.

WE CONCUR:

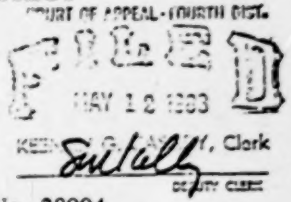
EDWARD T. BUTLER P.J.

WILLIAM L. TODD, JR. J.

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE



MICHEAL SCHAEFFER [*sic*],
Petitioner,

vs.

SUPERIOR COURT, ETC.,
Respondent,

JOAN STONE,
Real party in interest.

4 Civil No. 28904
SUPERIOR COURT NO. 484539

THE COURT:

The petition for writ of review has been read and considered, the petition is denied for the reason there is no factual showing of any abuse of discretion on the part of the Superior Court.

Acting Presiding Justice

Copies to: Mr. Micheal [*sic*] Schaefer
Luce, Forward, Hamilton & Scripps
Superior Court, SD

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL SCHAEFER,

Petitioner,

v.

SUPERIOR COURT, ETC.,
COUNTY OF SAN DIEGO,

Respondent,

JOAN STONE,
Real Party In Interest.

COURT OF APPEAL-FOURTH DIST.
FILED
1983
KEENAN G. CASADY, Clerk
DEPUTY CLERK

4 Civ. No. 31025

(Mun. Ct. No. 294278 and
Super. Ct. No. 484539

THE COURT:

The petition for writ of review and/or mandate has read and considered by Justices Wiener and Joseph.* The petition is denied.

Wiener
Acting Presiding Justice

*Assigned by the Chairperson of the Judicial Council.

Copies: All parties

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

2-14-83

I have this day filed Order

~~HEARING DENIED~~

Stay denied

In re: 4 C 19 *No.* 31025

Schaefer

vs.

Sup Ct

Respectfully,

Clerk

27074-877 8-82 4M • OBP

Michael Schaefer
333 Nutmeg St.
San Diego, Cal. 92103
Tel. 232-2014
Plaintiff in Proper Person

FILED
Oct 10 4 48 PM '80
CLERK OF MUNICIPAL
COURT OF SAN DIEGO
JUDICIAL DISTRICT

IN THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA

SAN DIEGO JUDICIAL DISTRICT

COUNTY OF SAN DIEGO

MICHAEL SCHAEFER
Plaintiff

vs.

JOAN STONE
Defendant

No. 294278

COMPLAINT FOR MONEY DAMAGES

TORT (BREACH OF IMPLIED COVENANT OF GOOD FAITH)

Plaintiff for cause of action alleges:

1. Defendant is a resident of the above Judicial District;

2. Parties hereto for more than 7 years have been parties to a real estate financing contract, said contract containing implied covenants of good faith between the parties; said contract was written;

3. Defendant owes a duty to the public in general and to plaintiff in particular to not disregard and breach its obligations pursuant to said implied covenant, which requires that neither party act in such a manner as to defeat the reasonable expectations of the other.

4. Plaintiff has been indebted to defendant in amounts unknown to plaintiff, but estimated to be about $80,000, said obligation coming due September 20, 1980. Plaintiff has offered to increase the interest thereon

from 10% to 15%, and to increase monthly payments from $1,062 to as much as $7,000, all of which have been rejected by defendant, as is her perogative.

5. Plaintiff has *at no time refused to pay the sums due* and owing. Plaintiff has to the contrary advised defendant that he is in application for a new loan in the amount of $50,000 on said property, with proceeds to be payable to defendant within 3 to 4 weeks, with balance to be paid monthly in amounts of not less than $2,500.

6. On September 26, 1980 defendant advised plaintiff that she "did not wish to renew the note", with no indication that foreclosure of the real estate would be undertaken if payment were not made forthwith.

7. On October 3, 1980 plaintiff inquired of defendant as to how much was due and owing on the obligation, plaintiff being desirous of having an exact amount to present to the lender involved in the $50,000 new financing. . . . with the thought that the new financing would be increased to $80,000 or whatever the unpaid balance was on the note.

8. On October 7, 1980, defendant caused to be recorded with the County Recorder, a NOTICE OF DEFAULT as to the premises, said notice for the first time providing plaintiff with information as amount due and owing, the amount stated in said notice to be $82,276.71. Plaintiff has had no prior information as to unpaid balance of the note within the period of recent months, when the note originally for $110,000 matured.

9. The mere act of filing the Notice of Default has placed the property in a trouble status, and may result in withdrawal by lender of its tentitive willingness to advance $50,000 to $80,000 to provide funds to payoff defendant, said lender already having a $190,000 note and deed-of-trust on said premises, and as a lienholder of record expected to receive its own copy of said Notice of Default.

10. New status of said property, apartments at 1312 12th St., San Diego, California, may require that plaintiff obtain his replacement funds from a "hard money broker" for terms estimated to cost 18% interest plus 12 points fee, instead of 17% interest plus 3 points fee anticipated to be charged by the institutional lender involved with the $190,000 loan on same premises (which was placed last spring for 15% plus 3 points fee.) The additional cost, expected to be not less than

$7,000, is an item of damages suffered by plaintiff herein, said damages to be proximately and actually caused by breach of defendant herein.

11. Defendant acted wilfully and maliciously, to cause hardship to plaintiff and force payment within 90 days at whatever cost to plaintiff, rather than permit plaintiff to arrange replacement financing within 30 days or more advantageous terms, as was currently being processed at time of recording of Notice of Default. Defendant should be held by way of example, to dissuade conduct of this nature in the future, by award of punitive damages in a sum not less than $10,000.00.

WHEREFORE, plaintiff prays judgment as follows:

1. Compensatory damages in amounts according to proof at trial;

2. Punitive damages in the sum of $10,000.00.

3. Costs of suit incurred herein;

4. Such further and additional relief as to the Court appears appropriate and just in the premises.

5. Plaintiff waives recovery in excess of jurisdiction provided for within the filing fee of $17.00, with additional fees to be paid in the event greater amounts are sought at trial of the cause.

Dated: October 10, 1980

Michael Schaefer
MICHAEL SCHAEFER
Plaintiff in Proper Person

VERIFICATION

Michael Schaefer declares under penalty of perjury that he is plaintiff herein, that he has read the aforementioned complaint for money damages, and knows the contents therein to be true to the best of his knowledge and belief.

Executed October 10, 1980 at San Diego, California.

Michael Schaefer
MICHAEL SCHAEFER

CORNISH & CORNISH
A Professional Corporation
Attorneys at Law
2119 Garnet Avenue
San Diego, California 92109
Telephone: (714) 272-3773

Attorneys for Cross-Complainant

MUNICIPAL COURT, SAN DIEGO JUDICIAL DISTRICT

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

MICHAEL SCHAEFER, Plaintiff, vs. JOAN STONE, Defendant.	Case No. 294278 CROSS-COMPLAINT FOR DAMAGES
JOAN STONE, as trustee under Declaration of Trust known as the H. I. STEVENS TRUST dated April 28, 1967, Cross-Complainant, vs. MICHAEL SCHAEFER and DOES I through X, Inclusive, Cross-Defendants.	

Cross-complainant alleges:

1. Cross-defendant is a resident of the above-mentioned judicial district.

2. Cross-complainant is ignorant of the true names and capacities of the cross-defendants sued herein as DOES I through X, Inclusive, and therefore sues these cross-defendants by such fictitious names. Cross-complainant will amend this complaint to allege their true names and capacities when ascertained. Cross-complainant is informed and believes and thereon alleges that each of such fictitiously named cross-defendants is responsible in some manner for the occurrences herein alleged, and that cross-complainant's injuries as herein alleged were proximately caused by cross-defendants' acts.

3. Cross-complainant is trustee under Declaration of Trust known as the H. I. STEVENS TRUST dated April 28, 1967.

4. On or about September 10, 1970, FAYE M. SCOTT, for valuable consideration, executed a Note for $110,000.00 secured by a Deed of trust on real property described as follows:

> The West 66 2/3 feet of Lot E and all of Lots F, G and H in block 185 of HORTON'S ADDITION, in the City of San Diego, County of San Diego, State of California, according to the Map thereof made by L. L. Lockling on file in the office of the County Recorder of San Diego County.

Said Note was executed in favor of H. I. STEVENS and FRANCES W. STEVENS, Trustees under Declaration of Trust known as the H. I. STEVENS TRUST dated April 28, 1967, and was to be paid in full on September 21, 1980. A copy of said Note and Deed of Trust is attached hereto as Exhibits A and B and incorporated herein by reference.

5. On or about January 22, 1974, FAYE M. SCOTT conveyed her fee interest in the above-described real property to cross-defendant MICHAEL SCHAEFER.

6. Thereafter cross-defendant MICHAEL SCHAEFER commenced making the payments called for by the Note above-described in Paragraph 4.

7. On September 21, 1980, cross-defendant MICHAEL SCHAEFER defaulted on this note and the whole thereof, together with the interest thereon.

8. On October 7, 1980, cross-complainant recorded a Notice of Default and Election to Sell Under Deed of Trust on the above-described real property declaring the sum of $82,276.71 to be the sum due as of that date.

9. Thereafter, on October 10, 1980, cross-defendant, instead of curing said default, commenced an action for an alleged Breach of Implied Covenant of Good Faith against JOAN STONE, as an individual, as Case No. 294278 in the above-entitled Court. The basis of said complaint is uncertain and unintelligible but cross-complainant is informed and believes, and on such information and belief alleges, that cross-defendant's action as plaintiff herein is based on his default in payments on the Note secured by Deed of Trust above-described.

10. The acts, persons and events described in the complaint by cross-defendant on file herein, so far as they can be identified by cross-complainant, relate to alleged acts and events in her capacity as trustee for the above-mentioned Trust and not as her individual acts.

11. Cross-complainant has answered the complaint and filed this cross-complaint to protect the interest of the H. I. STEVENS TRUST in the Note and Deed of Trust above-entitled.

12. By its terms said Note provides that if action be constituted on this Note the maker promises to pay such sums as the Court may adjudge as attorney's fees.

13. Cross-complainant has employed CORNISH & CORNISH, A Professional Corporation, whose employees are active members of the State Bar of California, to defend her against the complaint of cross-defendant to file and prosecute this action, and has incurred and will continue to incur attorney's fees and costs to defend against the action of plaintiff and to prosecute this cross-complaint. Said fees and costs will be submitted to the Court according to proof.

WHEREFORE, cross-complainant prays judgment against cross-defendant as follows:

1. For attorney's fees which will be submitted according to proof;

2. For costs of suit herein incurred;

3. For such other and further relief as the Court may deem proper.

CORNISH & CORNISH
A Professional Corporation

By: Jane D. Cornish
JANE DENHAM CORNISH

JAN 18 1980

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED JAN. 18, 1980

MICHAEL SCHAEFER,	Superior Court No. 442259
Plaintiff and Appellant,	Municipal Court No. 264466 (San Diego Judicial District)
v.	**ORDER**
LAKESHORE MANAGEMENT, INC.,	
Defendant and Respondent.	

We reverse the judgment for attorneys' fees. The second action is in tort and therefore the clause relating to attorneys' fees is inapplicable. In all other respects the judgment is affirmed.

PER CURIAM

P.J.

J.

J.

FILED
Robert D. Zumwalt, Clerk
JUN 10 1981
By P. Phelan, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED JUN 10, 1981

MICHAEL SCHAEFER, Plaintiff, Appellant and Cross-Respondent, vs. LAKESHORE MANAGEMENT, INC., Defendant, Respondent and Cross-Appellant.	Superior Court No. 464075 Municipal Court No. 249520 (San Diego Judicial District) **ORDER**

The judgment is affirmed. Schaefer's lease termination was not conditional. He terminated and offered a new tenant for a reward. The offer was not accepted. The question whether he earned the reward is not before us. Fees were properly denied, because the trial court correctly concluded the gist of this action was not on the lease.

BY THE COURT

P.J.

J.